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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1980

No. 80-6397

ORIGINAL COPY

RICHARD GRAHAM,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

Office of the District Attorney
Sullivan County, New York
By: STEPHEN F. LUNGEN
Special Prosecutor
Attorney for Respondents
6 North Main Street, Box 631
Liberty, New York 12754
(914) 292-4444

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STATUTES INVOLVED

Criminal Procedure Law of New York

Section 140.15 (4)
Section 120.80 (4)

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OPINIONS BELOW

This case was remanded to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department by Order of this Court dated May 12, 1980. Upon further consideration, the Appellate Division, Third Judicial Department, reaffirmed the defendant's conviction. The opinion can be found at 76 A.D. 2d 228, 431 N.Y.S. 2d 209. The original opinion of the Appellate Division, Third Department is reported at 69 A.D. 2d 544, 419 N.Y.S. 2d 290. The opinion of the Sullivan County

Court denying the Suppression motions of petitioner and the co-defendant RICHARD LUCAS is reported at 90 Misc. 2d 1019, 396 N.Y.S. 2d 966.

JURISDICTION

The jurisdiction of this Court to review the judgment below rests on 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Why Payton v. New York, 445 U.S. ____, 100 S. Ct. 1371, 63 L.Ed. 2d 639 should not be applied retroactively.

2. On the facts, this case is clearly distinguishable from Payton v. New York.

3. Did the arrest of the petitioner comply with the Fourth Amendment of the United States Constitution standards of reasonableness?

4. The evidence seized upon the arrest of the petitioner in his motel room had independent sources as contemplated by Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

5. Did the Appellate Division, Third Department, correctly apply to the motel search the harmless error doctrine of People v. Crimmins, 36 N.Y. 2d 230 and Chapman v. California, 386 U.S. 18?

6. Did the Court properly determine the admissibility of the petitioner's confession under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution?

7. Did the Appellate Division, Third Department, properly determine the admissibility of evidence coming from the search warrant executed upon the co-defendant's automobile?

FACTS

The facts of this case are set forth in great detail in the Trial Court's opinion which is located at 90 Misc. 2d 1019, 396 N.Y.S. 2d 966 through 969 (1977). Additionally, the facts were further summarized by the Appellate Division, Third Department in their opinion at 69 A.D. 2d 544, 419 N.Y.S. 2d 290 through 292 (1979).

The petitioner sets forth a statement of the case and, without getting into great detail, some exceptions to that statement are in order. Taking them in the sequence that they appear in the petitioner's statement, they are as follows:

(1) The Trial Court and the Appellate Division, Third Department, found that the arresting officers believed at the time of their entry into the petitioner's motel room that an arrest warrant had in fact been issued in the State of New York. This fact was evidenced by the reception of teletype messages to the Florida authorities working with the New York State Police confirming that the arrest of the petitioner and his co-defendant should be made for the crimes of murder, kidnapping and robbery and this confirmation occurred on the evening prior to the arrest. (RA 13-23)

(2) The petitioner's statement implying that the police lacked information concerning the Doberman pinscher dog's whereabouts with respect to the motel room is incorrect. The evidence proved that the police earnestly believed that the Doberman pinscher dog was located within the motel rooms. This was evidenced by the testimony of one of the arresting officers wherein

he wrapped a towel around his arm prior to entry for his protection. These facts were credited by the Trial Court and the Appellate Division. (RA 213-214)

(3) The petitioner's contention that the evidence taken from the motel room was utilized against him in the taking of the confession is incorrect and not substantiated by the evidence found by the Trial Court. Only the petitioner testified to its use. The police officers that questioned the petitioner were not the ones doing the inventorying of the property and they testified that none of it was shown to the petitioner during any of the questioning procedures.

The petitioner has attached as Appendices "F" and "G" a purported list of the property recovered from the co-defendant's vehicle and the motel rooms after arrest. The list, as it is portrayed in the appendix, is extremely misleading since it is given completely out of context with respect to the manner in which the items were seized. The petitioner has gratuitously separated the items seized into individual papers and exhibits, tremendously inflating the actual number of items obtained. (For example, the police obtained the petitioner's wallet at the motel arrest. This wallet is reflected by a listing of each individual item found within it, rather then listing a single exhibit.)

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

I

Payton v. New York should not be applied retroactively.

In determining whether a decision of the Supreme Court of the United States should be given retroactive effect, one must look to the guidelines as set forth in Stovall v. Denno, 388 U.S. 293. In that case, this Court set forth three basic criteria to be utilized in the question of retroactivity: (1) the purpose to be served by the new standards; (2) the extent of the reliance by law enforcement authorities on the old standards; and (3) the effect on the administration of justice of a retroactive application of the new standards.

When this case was remanded back to the New York State Appellate Division, Third Department, by Order of this Court to reconsider its findings in light of Payton v. New York, the Appellate Division had to determine the specific question of retroactivity. In People v. Graham, 76 A.D. 2d 228, 230-231, the Court stated as follows:

> "...the most important of these factors is the purpose to be served by the new constitutional rule..., and that purpose can only be discerned by a close examination of the rule to determine if the application of the same goes to the 'very integrity of the fact-finding process' (People v. Buia, 34 N.Y. 2d 529, 530; accord Stovall v. Denno, 388 U.S. 293, 298). Thus, the Court of Appeals has concluded that there is no sufficiently compelling reason for New York State to

> establish a time of application for newly promulgated constitutional rules different from that recognized by the Supreme Court (see People v. Buia, Supra, in which retroactivity of the rule of Chimel v. California, 395 U.S. 752 (narrowing the permissible scope of searches incident to arrest) was denied on the authority of Williams v. United States, 401 U.S. 646).
>
> We turn now to a determination of whether the newly promulgated constitutional rule affects the 'very integrity of the fact-finding process.' In view of how that guideline was applied by our Nation's highest court in Linkletter v. Walker (381 U.S. 618) wherein the exclusionary rule of Mapp v. Ohio (367 U.S. 643) was denied retroactive effect, as well as in Williams v. United States (Supra) and in Hill v. California (401 U.S. 797) where the rule of Chimel v. California (Supra) was held not to be retroactive, we are compelled to conclude that the subject rule, i.e., that, absent exigent circumstances, a warrantless entry for the purpose of a routine felony arrest is unconstitutional, is not so essential to the 'very integrity of the fact-finding process' that all past reliances upon existing statutory law should be negated so as to rehabilitate with innocence those who by their intentional acts seriously offended our penal statutes. Accordingly, we decline to apply Payton retroactively and adhere to our original decision."

The New York State Appellate Divisions for the First and Second Departments have reached similar conclusions with respect to the retroactivity question. All of the Courts were in agreement that it could not be stated that the major purpose of the new constitutional doctrine was promulgated to overcome an aspect of criminal trials that would substantially impair their truth-finding function. (See People v. Benitez, 76 A.D. 2d 196.)

The conclusions reached by the Courts above are well-founded and are a logical approach considering the nature of the rule enunciated by the Supreme Court. On October 19, 1975 when the police arrested this defendant, they did so based upon probable cause, the belief that he was within his motel room, under exigent circumstances for noticeless entry and in the good-faith belief that a warrant existed. Recognizing that this arrest was "warrantless", it was performed by the police upon the reliance on the validity of a New York statute at the time the arrest was effectuated. This statute permitted warrantless as well as a noticeless entry. (Criminal Procedure Law 140.15 (4) and 120.80 (4).)

The Courts have already recognized that the police should not be held as blameworthy when they conform their conduct to the prevailing constitutional and statutory norm. Considering the purpose of the exclusionary rule, i.e., to deter unlawful police conduct, then evidence should only be suppressed if it can be said that the police officers had knowledge, or are properly chargeable with knowledge, that their search was unconstitutional under the Fourth Amendment (see United States v. Peltier, 422 U.S. 531). As noted by the Court in Payton, approxi- twenty-four states permitted a warrantless entry into the home for the purpose of effectuating an arrest in the absence of exigent circumstances. Since the thrust of the Court's decision will be given effect through the exclusionary rule, its purpose was to correct a flaw in criminal procedure, not of the magnitude that deprives a defendant of his fundamental rights to a fair trial. Payton, therefore, should not be held retroactive, invalidating this defendant's arrest.

II

This case is clearly distinguishable on the facts from Payton v. New York.

The facts in Payton v. New York, 45 U.S. ____, 100 S. Ct. 1371, 63 L.Ed. 2d ____, are clearly distinguishable from the case at bar. In Payton, the police entered the defendant's apartment for the purpose of effectuating an arrest based upon probable cause, but without knowledge of the defendant's presence in his apartment. The entry by the police was without an arrest warrant and was forceably made. In Riddick, the police made a warrantless arrest in 1973 for an armed robbery that had occurred in 1971. This arrest took place in the defendant's house and, unlike Payton, there was limited notice of the police presence.

In Graham, when the police entered the motel room, they knew that he was present, they had probable cause to effectuate the arrest, they were aware of the charges, they believed the defendant to be armed, they knew of the existence of a vicious dog and took precautions for it, they believed that their own safety was in issue and, most important, they believed that a valid arrest warrant existed.

The facts demonstrate that the lack of an arrest warrant here was more technical than procedural and not by voluntary choice on the part of the police. There was nothing more that the police could have done in effectuating the defendant's arrest in terms of the Fourth Amendment and the arrest warrant requirement.

This Court in Payton, Supra, at Page _____ held that

the Fourth Amendment:

> "...prohibits the police from making a warrantless and nonconsentual entry into a suspect's home in order to make a routine felony arrest."

Implicit in the Payton decision and as stated by the Court at Page _____:

> "The Court of Appeals majority treated both Payton's and Riddick's cases as involving routine arrests in which there was ample time to obtain a warrant, and we will do the same."

The unique fact situation that exists in Graham takes this out of the context of a "routine felony arrest". The appellant does not argue or attempt to prove that the arrest here was routine. The very issues that he raises clearly demonstrates and supports the respondent's position that it was anything but routine. The police here determined that probable cause existed, and they needed an arrest warrant from New York. They requested this warrant well in advance of the arrest and they waited for it and received confirmation of its existence. This confirmation came by way of two teletype messages from New York, upon which the police officers could rely and believe that the arrest warrant in fact existed.

This is not a case of police error in judgment or intentional disregard of existing law to accommodate their needs. When one analyzes the choices available, and the decisions made by the police, it exemplifies the highest qualities of professional law enforcement. There is no police conduct here that need be deterred.

III

The petitioner's arrest was not violative of the Fourth Amendment standards of reasonableness.

The defendant's arrest in his motel room was proper, regardless of the warrant issue because it was based upon probable cause and in the presence of exigent circumstances. Nothing in the Payton decision excludes the justification of a warrantless entry into a home for the purpose of effectuating an arrest based upon probable cause and exigent circumstances when the arrest is not "routine". The affirmance of the petitioner's convictions by the New York State Appellate Division, Third Department, and the lack of review by the New York State Court of Appeals indicates that their decision is in conformity with the New York State, Federal and Constitutional standards.

In Ker v. California, 374 U.S. 23, 31 the Court made it clear that their prior decisions were not to be construed as an:

> "...assumption by this Court of supervisory authority over state courts, cf. Cleary v. Bolger, 371 U.S. 392, 401 (1963), and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law."

The Court went on to state at Page 34 that:

> "The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain".

In Ker v. California, Supra, the Court upheld an arrest performed in almost the identical fashion as was done in this case.

It was an arrest effectuated pursuant to State statutes allowing noticeless entry upon exigent circumstances through the use of a passkey. Additionally, the arrest was made without a warrant, although based upon a finding of probable cause. The Court held that the arrest sanctioned by California law was:

> "...not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment. (See Page 41)".

The petitioner herein initially seeks to have this Court review the facts in order to determine that probable cause was lacking. There is no question that this Court has that power, provided there are contradictory factual questions that require its determination with respect to whether the lower court's decision as to the constitutional standard of reasonableness has been respected.

The most oft cited definition of probable cause comes from Brinegar v. United States, 338 U.S. 160, 175-176 (1949) wherein the Court stated:

> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt."... And this "means less than evidence which would justify condemnation" or conviction.... Since Marshall's time, at any rate, it has come to mean more than bare suspicion; probable cause exists where "the facts and circumstances within their (the officers') knowledge, and of which they had reasonably trustworthy information, (are) sufficient in themselves to warrant a man of reasonable caution in the "belief that" an offense has been or is being committed...."

The Trial Court resolved the factual question that probable cause existed (utilizing the above definition) and the Appellate Division, Third Department, concurred.

The petitioner's contention that the New York Courts applied the wrong standard, that is, a "reasonable suspicion" standard rather than "probable cause", is not substantiated by the record. The Court's ruling on "probable cause" was based upon the constitutional standards as enunciated by this Court.

Since the lawfulness of any arrest without a warrant must in the first instance be based upon probable cause, the findings of the Court below are not in conflict. This determination does not end the petitioner's allegations with respect to the propriety of the arrest. The arrest proceedings occurred in the motel room of the petitioner, based upon a noticeless entry. The petitioner seeks to have this Court define the limits or the exceptions which would justify a noticeless entry. Such a determination on the facts in this case is not required.[1]

Although the Court did not specifically address the issue of exigent circumstances and more particularly as to what facts would constitute such, they did cite with approval the cases of Dorman v. United States, 435 F. 2d 385 (1969) and United States v. Reed, 572 F. 2d 412 (CA 2 1978) cert denied 439 U.S. 913. The most extensive discussion in this area can be found in Reed, Supra, and there the issue to be decided was:

> "...whether and under what circumstances the Fourth Amendment permits federal law enforcement officers to enter a suspect's home in order to effect a felony arrest for which the officers have both statutory authority and probable cause but no warrant." (See 572 F. 2d at P. 417)

The Court therein recognized that the Supreme Court has not spoken directly on that issue. After lengthy analysis, the

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1 The arresting officers in this case believed that at the time of their entry into the motel room to effectuate the arrest the New York State Police authorities had obtained an arrest warrant as requested the night before.

Court concluded that in the presence of exigent circumstances, such an arrest was constitutional. In the Court's determination as to whether exigent circumstances exist, they adopted the criteria enumerated in Dorman, Supra, wherein the following was set forth in Reed, Supra, Page 424:

> "These include (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause...to believe that the suspect committed the crime; (4) a strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry."

In Dorman, Supra, the Court also listed as another consideration, the time of entry.

Focusing solely on the issue of exigent circumstances, it is clear that the arrest of this defendant, if considered warrantless, was based upon the above-listed and accepted exigent circumstance criteria.[2]

The police knew that Craig Mitton was murdered after being shot three times by a small caliber weapon. They knew the connection between the deceased's employment and the defendant Graham. They further knew the connection of Lucas with the deceased's employment, his motive and need for money, his violent criminal history, his prior attempt a week earlier to break into the Middle Hope gas station belonging to Mid-Valley Petroleum Corp., his presence at the bank at the same time that the deceased was to have appeared for his night deposit, Lucas'

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2 United States v. Reed, Supra, Footnote 7 at P. 421 indicates that their decision is in accordance with the Sixth, Ninth and District of Columbia Circuits. See also United States v. Williams, 604 F. 2d 1102 (1979(where the exigent circumstances of Dorman, Supra, were utilized in the Eighth Circuit.

relationship with Graham, their immediate flight within two to three hours of the murder from New York to New Jersey and then to Florida, the lack of preparation as evidenced by the female companions' haste in leaving without knowing their destination and Graham's false identity in the Florida motel. These factors, coupled with the reasonable belief that they were still armed after having committed the most violent of felonies, together with the earnest belief that they were in the custody of a Doberman pinscher dog, a known vicious-type animal, requiring one of the arresting officers to wrap a towel around his arm prior to entry, all emphasized the reasonableness of the police conduct in the arrest of this defendant.

The Trial Court and Appellate Division found the existence of exigent circumstances permitting the noticeless and warrantless arrest and implicit in that finding, and the subsequent affirmance of the Graham case after its remand from the Supreme Court of the United States, is the fact that this was not a "routine felony arrest". The same circumstances that permitted the warrantless arrest also permitted the noticeless entry. Since they were performed simultaneously and upon the same facts, there is no logical reason to give them separate consideration.

The continuous and intensive investigation and police pursuit commencing on October 15, 1975 at the Brookhaven Bungalow Colony, Roosa Gap Road, Bloomingburg, New York, culminating at the Dania Travel Lodge Motel in Florida on October 19, 1975 at 8:00 a.m. represented strong and swift police action for the most violent of crimes; action that was predicated upon probable

cause, reasonable information and good-faith belief resulting in the apprehension of dangerous killers and taking them into custody. The confrontation and apprehension of these defendants could have been potentially much more dangerous and violent with a greater risk for escape or endangerment of life or safety of one of the officers or the defendants had this arrest occurred in any other fashion.

As stated by the Court in Dorman v. United States, Supra, and reiterated in Brooks v. United States, 20 Cr.L. 2267, 2268, the Court of Appeals of the District of Columbia:

> "The exigent circumstances doctrine is applied to the facts as perceived by the police at the time of entry, not as subsequently uncovered."

Based upon the facts as they existed in the case at bar, the police action on the notice and arrest was exactly as what was contemplated in United States v. Reed, Supra.

IV

The evidence obtained from the motel subsequent to the petitioner's arrest did not contribute to the petitioner's conviction.

The Appellate Division, Third Department's decision indicated that the search of the motel may have been overbroad under the guidelines established in Chimel v. California, 395 U.S. 752. The Court found that the evidence against the petitioner was so overwhelming that the items admitted at trial from the motel, if they be in error, were harmless under People v. Crimmins, 36 N.Y. 2d 230.

The petitioner's contention that the Appellate Division justified the search on the basis of the confession does not have support under the facts of this case. The Court's determination was clearly an evaluation of the total evidence presented against the petitioner in light of the items received from the motel. It concluded that there was no constitutional error as enunciated in Chapman v. California, 386 U.S. 18 because there was no reasonable possibility the error might have contributed to the petitioner's conviction and it was, therefore, harmless beyond a reasonable doubt.

If a search is improper, it can only have contributed to a defendant's conviction if the proceeds of the search are utilized at the trial. An overbroad search where the items obtained are not utilized at trial certainly cannot contribute to a conviction unless additional evidence obtained can be found to be the "fruits of the poisonous tree". In the instant matter only five items of evidence were produced at trial stemming from the motel search, and the first of such items introduced was done so by the defense. Additionally, each of those items had an independent source known to the police prior to their seizure, and this was established at the pre-trial suppression hearings. These independent sources are consistent with prior holdings of this Court as exemplified in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

Nor can credence be given to the petitioner's allegations that had it not been for the motel search there would not be a confession, therefore, they are all "fruits of the poisonous tree" as enunciated in Wong Sun v. United States, 371 U.S. 471.

The defendant was lawfully arrested and taken into custody by the police prior to the inventory of his motel room. His lengthy confession was a product of that lawful arrest totally disconnected in time and place from any of the items gathered by the police from the motel.

The Appellate Division's determination with respect to the lawful arrest, the motel search, the overwhelming proof against the defendant once his lawfully-obtained confession was admitted into evidence, and the harmless error doctrine is consistent with New York Law, the Fourth Amendment of the United States Constitution and the Supreme Court cases interpreting these issues.

V

The Trial Court's ruling of the admissibility of the petitioner's confession was not in conflict with the constitutional guidelines.

The petitioner attempts to assert that the Trial Court determined that the confession was voluntary based upon the sole consideration of its truthfulness. This is an inaccurate account of the testimony introduced at the pre-trial suppression hearings and of the Trial Court's findings.

The Trial Court found in the first instance that the confession was voluntary under the constitutional protections of the Fifth and Fourteenth Amendments as being freely and voluntarily made. This aspect was gone into in depth at the hearing as it was proven that the defendant's contention of a coerced confession was not credible. The Trial Court found that

this confession was not the product of any overreaching or mistreatment by the police.

The Court also determined that the confession did not violate the principles set forth in Miranda v. Arizona, 384 U.S. 436 since the defendant was adequately apprised of his constitutional rights several times prior to his confession, and those rights were preserved both in writing and on a tape recording.

Additionally, the Court determined that the arrest was lawful and that the confession was not the fruits of illegal police conduct. The court specifically reviewed Brown v. Illinois, 422 U.S. 590 finding that this arrest was not investigatory, but based upon probable cause and for the purpose of prosecution.

The standard of truthfulness as complained by the petitioner herein was not the criteria utilized for admissibility. The Court considered truthfulness only with regard to the defendant's contradictory testimony at the suppression hearing when he alleged that the police coerced his confession. (RA 338-339). Nothing in that finding violates the principles as stated in Rogers v. Richmond, 365 U.S. 534, 544 where the Court stated that:

> "The attention of the trial judge should have been focused, for the purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined ...."

This was clearly the focal point of the trial judge here.

VI

The search of the Lincoln Automobile was not in violation of the Fourth Amendment.

The petitioner contends here, as he did before the New York State Appellate Division, Third Department, that the second entry into the Lincoln automobile was a warrantless search in violation of the Fourth Amendment protections.

Initially, the police obtained a search warrant and pursuant thereto, searched the Lincoln Continental on October 17, 1975. Thereafter, on October 20, 1975, the vehicle was again dusted for additional fingerprint evidence based upon information stemming from the defendant's confession. In that second inspection four fingerprints were developed on the inside portion of the trunk lid which were later positively identified as belonging to the victim of the homicide.

The search warrant provided for the search of fingerprint evidence from the automobile and the return of the search warrant indicated, as one of the items of property seized, the automobile itself. Additionally, immediately before and after the search, the vehicle was kept under constant surveillance by members of the New York State Police through the second inspection and even after the arrest.

In effect, the automobile was seized by the police on October 17, 1975, as evidence of the homicide pursuant to a valid and lawful search warrant. As part of the probable cause for the warrant and the reasonable inferences that flowed from the facts, the police could reasonably infer that the automobile

was used in some manner in the commission of these crimes. The police certainly have the right to inspect and examine evidence that is already seized and within their control in a manner that is convenient and suitable for the purpose of their investigation. Whether these items of evidence are examined once or numerous times does not in any invalidate the already lawful seizure and only the legality of the initial seizure is in question, and that has already been ruled as proper.

This fact situation is clearly distinguishable from Mincey v. Arizona, ____ U.S. ____ 98 S.Ct. 2408 (1978) where the police conducted an exhaustive four-day warrantless search of the apartment where the defendant was arrested under the guise of a "murder scene exception". The Fourth Amendment here was fully complied with by a neutral magistrate issuing a proper warrant and pursuant thereto, evidence was seized. Its subsequent reinspection for additional information is not a second entry that can be viewed as a warrantless search as alleged by the petitioner.

CONCLUSION

For the reasons stated herein, the petition for Writ of Certiorari should be denied, in all respects.

Dated: Liberty, New York
April 21, 1981

Respectfully Submitted,

Office of the District Attorney
Sullivan County, New York
By: STEPHEN F. LUNGEN
Special Prosecutor
Attorney for Respondents
6 North Mair Street, Box 631
Liberty, New York 12754
(914) 292-4444